SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On December 11, 2002, the Water Pollution Control Board (board) conducted the first public hearing/board meeting concerning amendments to 327 IAC 15, Rules 5 and 6, concerning storm water run-off associated with construction activity and storm water discharges associated with industrial activity. Comments were made by the following parties:

Fort Wayne-Allen County Airport Authority (FWACAA)
Aviation Association of Indiana (AAIA)
Indiana Constructors, Incorporated (ICI)
Indiana Home Builders Association (IHBA)
Indiana Petroleum Council (IPC)
Indiana Water Quality Coalition (IWQC)

Following is a summary of the comments received and IDEM's responses thereto:

Rule 5 Comments:

Comment: They have been tracking these rules since introduction and have raised their concerns at previous board meetings about their serious concern with the rules exceeding federal requirements for Phase II. He is pleased to report that the Coalition has been working very hard with IDNR and IDEM and most of the key concerns had been resolved, therefore, will not be opposing preliminary adoption of the rule. They indicated that there were still some minor issues dealing with stabilization that the Home Builders group had, and was hopeful that those could be worked out before final adoption. (IWQC) (IHBA) (IPC)

Response: This item has been addressed by the addition of language allowing the site owner to demonstrate that adequate erosion and sediment control measures are implemented around the inactive area.

Comment: One of the biggest changes in the rule is that erosion control plans will have to be approved in advance of construction. The current rule only requires that a copy of the plan be sent to the SWCD and local authority for review prior to the commencement to construction. The proposed version requires that the plan be provided to the reviewing agency at least thirty (30) days in advance of construction and that the protect site owner receive notification from the reviewing agency that the plan complies with all the requirements, plus this has to occur before the NOI letter can be filed with the department. Though IDEM did make some changes in response to these concerns, ICI requests the board to reduce the thirty (30) day review period to twenty (20) days in 327 IAC 15-5-6(b)(3). A reference to the section 6 provision that allows the NOI letter to be submitted if the reviewing agency does not respond in a timely fashion should be added to (a)(14) of section 5; otherwise, there is a conflict in the rule. (ICI)

Response: Quality Storm Water Pollution Prevention Plans are the foundation of successful storm water pollution prevention during construction. Ten years of experience by the agencies has shown that quality plans are not as common as they should be. Plan review for adequacy is a critical component to the success of the program. The agency requires adequate time to complete a thorough review. The proposed rule allows the agency to have up to a twenty-eight (28) day period for plan review.

There is a conflict in language between 327 IAC 15-5-5(a)(14) and 327 IAC 15-5-6 (b)(3). To correct this conflict the agency will add the following language to 327 IAC 15-5-

5(a)(14): “A notification from the SWCD, DNR-DSC or other entity designated by the department as the reviewing agency indicating that the construction plans are sufficient to comply with this rule. This requirement may be waived if the project site owner has not received notification from the reviewing agency within the time frame specified in 327 IAC15-5-6(b)(3).”.

Comment: In 327 IAC 15-2-9, it appears that the project site owners who obtained general permit coverage for construction projects under the current rules will have to refile a plan and submit a new NOI once the new rule becomes effective. This was discussed in earlier meetings, and the department had indicated that this was not their intent but no change has been made in the rule. If this language is left in, there will have been wasted effort on the part of the industry. (ICI)

Response: 327 IAC 15-2-9 states that once the general permit rule is amended all persons currently affected by that rule will be notified and that NOIs would be submitted ninety (90) days after receipt of a notice from the commissioner. Therefore, projects that are currently regulated under Rule 5 would only need to submit a new NOI if they receive a notice from the commissioner asking them to do so.

Comment: In 327 IAC 15-5-7(b)(18), the requirement to make and maintain evaluation reports following storm events shifts the focus of the rule from environmental protection to paperwork. The additional documentation and the possibility of getting penalized for poor paperwork is objectionable. (ICI)

Response: The intent of a self- monitoring program is to promote a regularly scheduled program in which erosion and sediment control practices are maintained and repaired. The purpose of an evaluation report is to document the routine self-inspections. The report serves as documentation of corrective actions that are required to keep the project in compliance. The report should be used by project site decision-makers to assess deficiencies, determine corrective actions, and document that corrective actions are implemented. An effective self-monitoring program will reduce overall project costs by reducing post construction costs associated with cleaning of storm water detention/retention basins, flushing of storm sewers and culverts, and removal of sediment from drainage channels and adjoining properties, etcetera.

Comment: The “one-size fits all approach” taken in section 7(b)(16) in requiring unvegetated areas to be stabilized if they are left inactive for fifteen (15) days or more is inappropriate. Every construction site is different; therefore, erosion and sediment control measures should address site-specific conditions. Though a sentence has been added since the last meeting, the meaning is unclear. It is recommended that alternative measures "are acceptable" rather than the current wording of "may be acceptable". The project site owner should be required to state in the erosion control plan how disturbed areas that will be inactive for fifteen (15) days or longer will be addressed and be accountable for following the plan. (ICI)

Response: Stabilization of inactive areas is an important part of the system approach to erosion and sediment control. By reducing the erosion potential of inactive areas through stabilization, there will be less pressure on the other implemented erosion and sediment control measures. There may be situations in the field where sediment control used independently of stabilization is not adequate. The proposed rule gives the project site owner more flexibility in choosing alternative methods of surface stabilization and sediment control throughout the life of

the project, whereas the language proposed by ICI would appear to lock the developer into implementing only those practices designated in the plan.

Comment: Another issue that has been discussed, but not yet addressed, is an appeals process that a project site owner can utilize if it believes that the SWCD, MS4, or other review agency is being unreasonable in the control measures that the agency wants to implement on a site. There should be an impartial administrative review board that can consider such matters so that every dispute doesn't end up in a court of law. (ICI)

Response: The Office of Environmental Adjudication (OEA), created and operating under IC 4-21.5-7, reviews decisions of the commissioner of IDEM. The OEA is the impartial administrative review board the commentor has requested. If the commentor is referring to disagreements with the agency on specific items that have not yet reached the level of an agency action or decision that is reviewable by the OEA, IDEM believes that informal negotiations and discussions are preferable to adding another administrative review body to the permitting process.

Comment: There is a conflict in the rule. On one hand, 327 IAC 15-5-6.5(b)(A)(ii) requires that a copy of the completed NOI letter be included in the construction plan, but, on the other hand, 327 IAC 15-5-5(a)(14) states that the NOI letter cannot be submitted until the construction plan has been approved by the reviewing agency. One of these requirements should be changed so that it is possible to comply with both revisions. (ICI)

Response: There does appear to be a conflict with submission of the Notice of Intent at the time of plan submission. The issue raised can be resolved by removing item (ii) from 327 IAC 15-5-6.5(a)(1)(A) and 327 IAC 15-5-6.5(b)(1)(A).

Comment: It needs to be clarified in the rule, most notably in section 6(b), that the “other entity designated by the department for review and verification” is in fact a MS4 with an approved program. (ICI)

Response: This may not always be a MS4. “Other entity” designated by the department may refer to a local city or county planning department or other local unit of government that is not designated an MS4. The agency plans to supply an updated list on their website providing the names of various designated entities for each county.

Comment: The interaction between Rules 5 and 13 needs to be considered. The prospect of one hundred seventy (170) or more different erosion control programs around the state could create great confusion for the construction industry. IDEM should work with local government groups and representatives of other MS4s to develop model programs so there is consistency throughout Indiana. (ICI)

Response: IDEM and DNR-DSC in cooperation with local SWCDs have been actively working with MS4s and regional planning departments in the promotion of MS4 co-permitting. Some inconsistency is inevitable and not uncommon when a local entity develops its own ordinances.

Comment: The rule proposal greatly expands the regulatory burden on the industry. The board needs to examine whether each element is really necessary. (ICI)

Response: The agency has worked very hard to develop an effective regulation meeting the federal requirements while minimizing the burden on the regulated community. Quite a number of meetings were held with industry groups and their concerns weighed heavily on decisions involving specific requirements.

Comment: 327 IAC 15-2-8 allows IDEM to negate transferability. If the conditions are valid and are met, then IDEM should not be authorized to prohibit transferability. (ICI)

Response: The only aspect of non-transferability that exists is the requirement to submit a new NOI for the new owner. This is the only means for the agency to have a record of the change in ownership and responsibility.

Comment: It appears that the grading of county gravel roads would require a construction plan. This could be clarified in the definition of construction activity. (ICI)

Response: Language was clarified so as not to regulate maintenance of existing gravel roads.

Comment: Notifying the plan review agency and IDEM within forty-eight (48) hours of the actual start of construction activity seems needless. Some clarification is needed on this issue. (ICI)

Response: The expected start date for a project is delayed for various reasons. Notification to the plan review agency will prevent unnecessary travel by site inspectors to sites that have not started construction due to delays or other reasons.

Comment: The material handling provision in 327 IAC 15-5-6.5(b)(7)(H) should be applicable only to the handling and storage of hazardous substances that present a possible threat to the waters of the state. (ICI)

Response: The purpose of the rule is to implement appropriate practices for all possible pollutants that may leave the site and threaten waters of the state.

Comment: The contractor determines some of the information required in the submission of the construction plan. Therefore, the project site owner does not know how these aspects will be handled when the plan is developed. The rule partly acknowledges this by stipulating that certain information had to be included in the plan only to the extent that it was "under control of the project site owner". Similar language should be added to the provisions regarding off-site activities, soil stockpiles, borrow areas, construction sequence, and material handling/storage. (ICI)

Response: Stockpiles, etcetera, are included in the proposed rule under 327 IAC 15-5-6.5 (a)(5)(C) (see next comment as this citation requires change) and contains language that refers to control by the project site owner. Similar language will be added to 327 IAC 15-5-6.5 (a)(5)(A) and will read “Delineation of all proposed land disturbing activities, including off-site activities that will provide services to the project site and are under the control of the Project Site Owner”. With regard to material storage and handling, it is the intent to have procedures in place to address the containment and control of pollutants that impact water quality. While it is true that the Project Site Owner or the engineer may not be able to predetermine an exact construction sequence describing the relationship between implementation of storm water quality measures

and stages of construction activity, they should have the capability of developing a basic level of a construction sequence that can be modified as individual contractors are selected.

Comment: There appears to be some confusion in the numbering of both sections 6 and 6.5 and an incorrect reference to section 12. (ICI)

Response: Section 6 appears to be correct. However, in Section 6.5(a) the numbering is incorrect. The numbering should be corrected beginning at 6.5 (a)(2) through 6.5(a)(8). Section 6.5(a)(2) through 6.5(a)(8) should be renumbered 6.5(a)(1)(B) through 6.5(a)(1)(H). The reference to section 12 in 327 IAC 15-5-12 (b) should be changed to 12(c) or sections.

Comment: Section 10(e) mentions a quality assurance plan that is not defined anywhere in the proposed rule. Other sections which referred to a quality assurance plan in earlier versions were changed to a self-monitoring program, but the reference to quality assurance plan still remains in 10(e). If it needs to be left in then an explanation of what it constitutes, is needed. (ICI)

Response: The term should be changed to "self monitoring program" instead of "quality assurance" for consistency in the rule.

Rule 6 Comments

Comment: Concern was expressed with the requirement to obtain an individual NPDES storm water permit due to use of certain stated deicing compounds in amounts in excess of certain stated limits. The limits allegedly date back to ten (10) years ago. Currently, most airports in Indiana are reportedly covered under group storm water permits, which were allowed in the early 1990's. Each facility has its own unique character, and one, across-the-board rulemaking does not serve the communities, airports, or the citizens. Concern was expressed with the stated limits for urea and glycol compounds, which trigger the requirements of an individual permit. (FWACAA, AAI)

Response: IDEM currently utilizes individual NPDES permits for most storm water discharges associated with airport deicing operations. Since the middle 1990's, group storm water permits have not been accepted in Indiana, and the existing group permits were terminated in favor of specific facility permits. The purpose of a general permit rule, such as Rule 6, is to make it general enough to be applicable to a wide variety of similar discharge sources. If a discharge is unique, then it is more appropriately covered by a facility-specific individual NPDES permit. The "trigger" limitation language for urea and glycol compounds in the rule was deleted, and the rule language was changed to require individual storm water permits for airports that use any amount of aircraft deicing compounds that have the potential to impact a water of the state.

Comment: The amount of deicing chemical should not be used as a trigger mechanism due to variability of the land area size, chemical usage, and tenant base at airport facilities. Since the size of an airport facility may correlate to the amount of chemicals utilized, a more appropriate trigger for individual permit coverage should be to use a chemical amount per-acre of watershed. Larger facilities will generate more storm water run-off and will likely have larger receiving watersheds, and deicing chemicals should have more dilution. (FWACAA, AAI)

Response: Dilution does not always correspond to a minimal impact on the receiving

water. IDEM typically bases pollutant limitations on the amount of pollutant, the average flow of the receiving water, and the ability of the receiving water to handle the pollutant amount. IDEM feels that chemical usage, in any amount, could impact a receiving water, and, as such, should be more appropriately covered under an individual NPDES storm water permit. General storm water permits issued under Rule 6 are not intended to take into account the impact variability of deicing chemicals. The "trigger" limitation language for urea and glycol compounds in the rule was deleted, and the rule language was changed to require individual storm water permits for airports that use any amount of aircraft deicing compounds that have the potential to impact a water of the state.

Comment: Many changes have occurred in the airport industry relative to deicing chemicals. The current rule language is too broad and open-ended in terms of regulating other pollutants which could be discharged into the waters of the state. The suggestion was given to have individual permit exemptions granted for using environmentally friendly substitutes for ethylene glycol, such as potassium acetate and propylene glycol, which have been developed over the last ten (10) years. The other suggested exemption is regarding the use of urea, not for transportation-related purposes, but for farming operations that use thousands of acres of airport land for agricultural purposes. The industry wants to continue to work with both IDEM and the board to help make these regulations as meaningful as possible. (FWACAA, AAI)

Response: The use of more environmentally friendly substitutes is a desirable practice to IDEM. However, the intent of a general permit is to make it general enough to be applicable to a wide variety of similar discharge sources, and the use of different chemical compounds is more appropriately covered by site-specific individual NPDES storm water permits. As for the use of urea for farming operations on airport land, the farming activity is not regulated by Rule 6. IDEM encourages the use of best management practices related to farming application of fertilizers and pesticides, but farming activities are already exempt from the storm water regulations.

Comment: The definition of airport deicing operations should be revised to take into account the various forms and dilution concentrations of glycol compounds used at airports. The suggested recommendation is that the one hundred thousand gallons of glycol compounds be further specified as one hundred percent (100%) concentrate and it be focused on ethylene glycol. This focus is further justified by a belief that U.S. EPA's only deicing chemical reporting requirement is for the use of ethylene glycol. (FWACAA, AAI)

Response: The definition was revised to eliminate reference to specific types of deicing compounds. If any amount, type, or concentration of deicing compound is used, an individual NPDES storm water permit, because it can be written to take into account chemical type and concentration, would provide more appropriate coverage than a Rule 6 permit.

Comment: A suggestion was raised to allow a two-year implementation period for airports to come into compliance with the new Rule 6 requirements, commencing from the effective date of the new rule. (FWACAA, AAI)

Response: Airports will not be treated any differently than other types of industrial facilities subject to Rule 6. Furthermore, gradual implementation of best management practices and other means to reduce storm water pollution is already allowed in the rule. The rule allows for continual review of the facility's storm water program to ensure that storm water pollution is

being minimized and receiving waters are not being significantly impacted. Pollution controls and practices may be added or changed at any time during the permit term.

Comment: Concerns were raised over the case-by-case basis for requiring an individual storm water permit for airports if the airport uses deicing chemicals in amounts less than the limits stated in the rule. The case-by-case determination is too vague. If the stated limits have scientific basis, then the commissioner should not need discretionary authority. A willingness was expressed to work with IDEM to find limits that are developed using scientific rationale. (AAI)

Response: The language referring to commissioner determination and threshold deicing chemical amounts was deleted. To improve clarity, the rule language was changed to require individual storm water permits for any airport that uses aircraft deicing chemicals, regardless of the amount.

Comment: The definition of airport deicing operation was not in the original version of this rule in the September 2001 Indiana Register. Were any of the airports contacted regarding this definition? (AAI)

Response: The definition was originally added based on comments IDEM received from the regulated community concerning what criteria was used to require individual storm water permits for airports. The definition, which was based on federal language, was intended to help clarify that issue. However, after additional comments and discussions, the definition was revised to specify any deicing compounds.

Comment: There are no apparent environmental improvements to be gained with this rule. (AAI)

Response: Rule 6 is federally required and addresses storm water pollution from industrial facilities. By permitting categories of industry with the greatest potential to cause pollutant impacts to waters of the state, IDEM is fulfilling the federal requirements and initiating a best management practice-driven solution to storm water pollution from industrial sources. Once storm water pollution from these industrial sources is minimized, the quality of receiving waters in the state will improve chemically and biologically thus potentially enabling the waters to support beneficial uses. The rule forces industrial facilities to assess their facilities for appropriate controls and practices so that storm water discharge quality is improved.

Comment: Concern was raised with the fiscal impact of the rule, specifically to the airport industry. The cost of the rule on airports was requested, both for airports already permitted under Rule 6 and those that will be subject to the rule based on rule revisions. Emphasis was placed on the financial problems of the aviation industry since the events of September 11, 2001, that have already caused additional costs for airports. (AAI)

Response: Since storm water discharges for the airport industrial category are already regulated, the original fiscal analysis was not changed. The revised rule language pertaining to airports is an attempt to clarify existing state program operating procedures at IDEM. IDEM currently requires airport facilities with deicing chemicals to obtain individual storm water permits. The rule simply clarifies the situations when airports can remain under Rule 6 coverage (that is, when they have on-site maintenance, and do not use aircraft deicing chemicals).